

Adoption Proceedings Benchbook



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Benchbook Layout

- Introduction to the Adoption Code
- Freeing a Child for Adoption
- Identifying the Father
- Jurisdiction, Venue, and Petition Requirements
- Temporary Placements, Investigation Reports, and the Safe Delivery of Newborns
- Formal Placement and Action on the Petition

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Benchbook Layout Cont . . .

- Rehearings, Appeals, Rescissions, and Dissolutions
- Direct Placement Adoption, Step-Parent Adoption, Relative Adoption, and "Legal Risk" Placements
- Record Keeping Requirements and Release of Information
- Paying the Costs of Foster Care and Adoption
- The Indian Child Welfare Act
- Appendices

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Legal Issues

- Guardian's Authority to Release or Consent
- Section 45 Motion – Arbitrary and Capricious
- Termination Pursuant to a Step-Parent Adoption
- Incarcerated Party Court Rule
- *In re JK*, 468 Mich 202 (2003)
- Legal Risk Placement v. "At Risk" Adoption
- Grandparent Visitation
- The Compensation Dilemma
- Application of ICWA to Adoption Proceedings

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Guardian's Authority

MCL 710.28(1)(d) & (e) - Guardian may release a child for adoption.

MCL 710.28(3) & (4) – Guardian may not release without first obtaining authority to execute the release from the court.

MCL 700.2515(e) – A full guardian's power includes the ability to release or consent to a minor ward's adoption.

Section 2.1; pages 10-13 and
Section 2.6; pages 28-30

The Loop-Hole

- Guardian has the authority, however no order terminating parental rights is ever entered for the biological parents.
- *In re Partello*, unpublished opinion per curiam of the Court of Appeals, September 15, 1998 (Docket No. 202757).
- *In re Blaylock*, unpublished memorandum opinion of the Court of Appeals, December 28, 2001 (Docket No. 234755).

Section 2.1; pages 10-13 and
Section 2.6; pages 28-30

Consent Withheld or Denied

- If petitioner is unable to obtain consent to adopt, then petitioner may file a motion with the court alleging that the decision to withhold consent is arbitrary and capricious.
- The standard of proof is clear and convincing.

- MCL 710.45

Section 7.3, pages 218-222

Arbitrary and Capricious

"Arbitrary" is "[W]ithout adequate determining principle. . . . fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned."

"Capricious is; '[A]pt to change suddenly; freakish; whimsical; humorsome.'"

- *Bundo v Walled Lake*, 395 Mich 679, 703, n17 (1976) citing the United States Supreme Court in *United States v Carmack*, 329 US 230, 243 (1946).

Section 7.3, pages 218-222

Findings

- If court finds clear and convincing evidence that decision was arbitrary and capricious then the court may terminate the rights of the appropriate court, child placing agency, or FIA and enter further orders in accordance with the Adoption Code or MCL 712A.18. MCL 710.45(6)
- Court may also grant to the petitioner reimbursement for the cost of preparing, filing, and arguing the motion, including reasonable attorney's fees. MCL 710.45(6)
- If the court does not find clear and convincing evidence that the decision was arbitrary and capricious then the court must deny the motion and dismiss the adoption petition. MCL 710.45(5).

Section 7.3(A)(3); page 221

In re Cotton, 208 Mich App 180 (1994)

- The Court must *not* substitute its own judgment for that of the person or agency withholding the consent.

Section 7.3, pages 218-222

Termination in Step-Parent Adoptions

- Child's Parent Must Meet One of the Following:
 - Parents divorce,
 - If parents are unmarried then either
 - Father has acknowledged paternity or
 - Father is a putative father who meets the conditions of MCL 710.39(2).
- Parent with Legal Custody of Child Marries and Step-Parent petitions to Adopt the Child
- If both of the following occur the court may terminate the parental rights of the noncustodial parent:
 - Noncustodial parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
 - The noncustodial parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition. MCL 710.51(6)

Section 2.13, pages 59-64¹¹

Case Law

- *In re ALZ*, 247 Mich App 264 (2001)
- *In re Martyn*, 161 Mich App 474 (1987)
- *In re Halbert*, 217 Mich App 607 (1996)
- *In re Kaiser*, 222 Mich App 619 (1997)
- *In re Simon*, 171 Mich App 443 (1998)
- *In re Hill*, 221 Mich App 683 (1997)

Section 2.13(B), pages 61-64

Incarcerated Party

- MCR 2.004 applies to
 - Domestic relations actions involving minor children
 - Actions involving the custody, guardianship, neglect, or foster-care placement of minor children
 - Termination of parental rights
- When a party is incarcerated under the jurisdiction of the DOC

Section 2.16; pages 70-72³

Responsibilities of Petitioner

- MCR 2.004(B) requires the party seeking an order to do all of the following:
 - Contact the doc to confirm the incarceration and the incarcerated parties prison number and location;
 - Serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
 - File with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion must state that a telephonic hearing is required

Section 2.16; page 70

Responsibilities of the Court

- MCR 2.004(C) requires the court to:
 - Issue an order to allow the incarcerated party to participate in a hearing or conference. The order must include:
 - Date and time of hearing
 - Prisoner's name and identification number
 - The Court must serve the order on the parties and the warden or supervisor at the DOC
 - Participation must be by a noncollect, unmonitored telephone call.

Section 2.16; page 70

Purposes of the Phone Call

- Determine if the incarcerated party has adequate notice of the proceedings and the opportunity to respond and participate.
- Determine whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected.
- Determine if the incarcerated party is capable of self-representation, if they so chose.
- Determine how the incarcerated party can communicate with the court during the pendency of the action and any special assistance necessary for communication.
- Determine the scheduling and nature of future proceedings, including how the incarcerated party will participate.

Section 2.16; page 71 ¹⁶

Denial of Relief & Sanctions

- The Court may not grant the relief requested by the moving party if the incarcerated party has not been offered the opportunity to participate in the proceedings as provided in MCR 2.004, unless the incarcerated party actually does participate in a telephone call. MCR 2.004(F).
- The court may impose sanctions upon finding that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts. MCR 2.004(G).

Section 2.16; page 71

In re JK, 468 Mich 202 (2003)

- Circuit Court may *not* grant an adoption when an appeal of the termination of parental rights is pending.

Section 6.4; page 201

Legal Risk Placement vs. "At Risk" Adoption

"At oral argument it was reported that the county designated this as an "at risk" adoption. Apparently, this adoption was labeled that because the county took a "risk" that this Court might vacate the termination of parental rights. We explicitly disapprove of this practice. Such an "at risk" adoption does a disservice to all the parties involved." *In re JK*, 468 Mich 202, fn 25 (2003).

Section 8.5; pages 252-253

Derose v. Derose, __ Mich __ (2003)

- MCL 722.27b – Grandparent Visitation
Right to seek grandparent visitation is not terminated by a step-parent adoption.
- However, Michigan Supreme Court found the grandparent visitation statute unconstitutional as written.

Section 6.7; pages 206-207

The Compensation Dilemma

- Agreements which include forgiving arrearages
 - To whom is the child support owed?
 - Does a current support order exist?
 - Would court approval of the agreement make the consent or release contingent upon future behavior?
 - Could the agreement be enforced?
 - Does the agreement safeguard and promote the best interests of the adoptee and protect the rights of all of the parties concerned?
 - Will the arrangement assure that the adoptee is free for adoption at the earliest possible time?
 - Parent must verify that the validity and finality of the release is not affected by any collateral or separate agreement. MCL 710.29(5)(d).

Section 10.2(C); pages 275-277

Application of ICWA

- If any of the following proceeding involve an Indian child then ICWA applies:
 - Consent to adoption; 25 USC 1903(1)(ii).
 - Release for adoption; 25 USC 1903(1)(ii).
 - Temporary placements; 25 USC 1903(1)(iii).
 - Direct placements; 25 USC 1903(1)(iii)-(iv).
 - Formal placements; 25 USC 1903(1)(iv).
 - Step-parent adoptions, including termination of parental rights pursuant to the Adoption Code; 25 USC 1903(1)(ii)-(iv).
 - Relative adoptions (ICWA expresses a preference for relative adoptions); 25 USC 1903(1)(iv).
 - Termination of parental rights; 25 USC 1903(1)(ii).

Section 11.2; page 292²²

"Indian Child"

- 25 USC 1903(4) defines "Indian Child" as any unmarried person who is under age 18 and is either
 - (a) a member of an Indian tribe or
 - (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Section 11.3; pages 292-295²³

Notice of Proceedings

- ICWA mandates a tribal right of notice an intervention in involuntary proceedings but not voluntary ones. 25 USC 1912.
- Notice which indicates a parties' rights to intervene must be sent to child's parents, the child's Indian custodian, if any, and any tribes that may be the Indian child's tribe.
- "Parent" excludes unwed fathers whose paternity has not been acknowledged of established.

Section 11.4; pages 295-295²⁴

Invalidation of Action

- If the Court violates ICWA a petition may be filed to invalidate the state court actions.
- Petitions may be filed by any of the following:
 - An Indian child subject to foster care placement or termination proceedings under state law;
 - A parent or custodian from whom the child was removed; and
 - The Indian child's tribe.
- *In re Morgan*, 140 Mich App 594, 601-04 (1985).
- *In re IEM*, 233 Mich App 438, 449-50 (1999).

Section 11.16; page 342

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